

(2014) 07 J&K CK 0008

In the Jammu And Kashmir High Court

Case No : LPASW No. 234/2001 and CMA No. 292/2001

Union of India

APPELLANT

Vs

Hardeep Singh

RESPONDENT

Date of Decision : 09-07-2014

Acts Referred:

Army Act, 1950 — Section 2(1), 21, 39(b)
Constitution of India, 1950 — Article 19(1)(c), 33

Citation : (2014) 3 JKJ 351

Hon'ble Judges : M.M. Kumar, C.J;Tashi Rabstan, J

Bench : Division Bench

Advocate : Rajneesh Raina, CGSC, Advocate for the Appellant; Rakesh Sharma, Advocate for the Respondent

Judgement

M.M. Kumar, C.J.—The instant appeal by the Union of India and its officer is directed against judgment and order dated 06.07.2001

rendered by the learned Writ Court in SWP No. 692/1998 holding that in the absence of issuance of charge sheet apprising the petitioner-

respondent of the charges, the punishment of rigorous imprisonment of 6 months coupled with dismissal is bad. The view taken by the learned Writ

Court culminates in the concluding para of the judgment which reads thus:-

I am accordingly of the view:

- i) That the proceedings of the summary court martial do not indicate as to what was the charge which the petitioner was supposed to meet?
- ii) The column at internal page-B dealing with the charge and also with regard to the effect that this charge was translated or not is left blank.
- iii) If this be the position, then the finding regarding the petitioner having accepted the guilt becomes redundant. Proforma from pages 'A' to I does

not bear signature of the petitioner.

This petition is accordingly allowed. Order of dismissal shall not be given effect to. As indicated above, respondents may if so advised, proceed

further in the matter in accordance with law.

Brief facts may first be set out. The petitioner-respondent was enrolled in Army as Grenadier on 14.10.1988. On completion of his basic military

training he was posted to 15th Grenadiers on 14.11.1989. When the Unit was combating militancy in Kashmir in the year 1991 the petitioner-

respondent was granted 14 days casual leave with effect from 23.09.1991 to 06.10.1991. He overstayed his leave without any information to the

army authorities. He however, voluntarily re-joined duty on 06.03.1992 thereby absenting without leave for 152 days. As a result Summary Court

Martial proceedings were initiated against him and he was tried under the Army Act, 1950 and the rules for committing offence under Section

39(b) of the Act. The appellant claims that full opportunity was granted to the petitioner-respondent at the time of summary of evidence as well as

during the Court Martial Proceedings however he admitted the offence and pleaded guilty. Accordingly he was found guilty and was sentenced to

six months rigorous imprisonment. He was also dismissed from service vide order dated 04.04.1992. His statutory appeal was rejected in

accordance with the rules and regulations.

2. Against the order dated 04.04.1992 and the appellate order the petitioner-respondent preferred a writ petition relatable to the instant appeal.

As the writ petition has been allowed by the learned Writ Court, feeling aggrieved the Union of India and its Officer has challenged the judgment

and order dated 06.07.2001 in the present proceedings.

3. Mr. Rajneesh Raina, learned CGSC has challenged the finding recorded by the learned Writ Court and has drawn our attention to the charge

sheet dated 12.03.1992 which clearly reveals the charges against the petitioner-respondent. According to the learned counsel it is spelt out that he

was granted 14 days casual leave from 23.09.1991 to 06.10.1991 and he failed without sufficient cause to rejoin the Unit on expiry of the said

leave. He voluntarily re-joined on 06.03.1992 at 16.00 hours. He has then made a reference to the summary of evidence and the statements made

by PW1 Sub Piar Singh of C-Coy; 15 Grenadiers, PW2 Hav. Kuldip Singh and PW3

Co. Hav. Major (CHM) Raj Kumar, The petitioner -

respondent was given opportunity to cross examine the witnesses but it was not availed He has then made a reference to the questionnaire

Annexure P-C. with the writ record where the petitioner-respondent has in response to Question No. 1. "whether he pleads guilty", has recorded

the expression with his own hands as "guilty" There is a certificate issued by Col. Rakesh Berry, certifying that before recording the plea of guilty

offered by the accused, the court explained to the accused the meaning of the charge to which he has pleaded guilty and he accepted that he

understands the nature of the charge to which he had pleaded guilty. He was also informed the consequences which were to follow by pleading

guilty and the Court have recorded satisfaction that the accused understood the charge and the effect of his pleading guilty. Accordingly it was

certified that the provisions of army Rule 115(e) are complied with. In para 2 again the petitioner- respondent say, "I accept my fault and pleads

for lenient view". He also declined to call any witness in his defence. All this has led to the passing of order dated 04.04.1992 inflicting sentence to

undergo six months rigorous imprisonment and also dismissal from service. The aforesaid order was challenged by the petitioner- respondent by

filing appeal (Annexure P-F) and the Chief of the Army Staff vide order dated 15.07.1997 has dismissed the same (Annexure P-G) by holding that

the gravity of the offence and the corresponding severity of the punishment relates to the fact that the unit was deployed on active service in

counter-insurgency operations in Jammu and Kashmir which the individual attempted to avoid by remaining absent without leave.

4. Mr. Rakesh Sharma, learned counsel for the petitioner-respondent has, however, argued that the punishment is disproportionate to the nature of

charges of overstaying the leave for a period of 152 days. According to the learned counsel six month's rigorous imprisonment in Quarter Guards

was sufficient to meet the ends of justice. However, he has failed to rebut the submissions made by Mr. Rajneesh Raina, learned CGSC, with

regard to the error committed by the learned Writ Court while recording the finding that there was procedural defect in conducting the summary

court martial, inasmuch as the charge was not brought to the notice of the petitioner-respondent.

5. Having heard learned counsel for the parties and pursuing the record we are of the considered view that the findings recorded by the learned

Writ Court are against the record. There are various documents available on writ record itself which show that the charge sheet was issued to the

petitioner-respondent on 12.03.1992 followed by recording of summary of evidence and three witnesses were examined. The petitioner-

respondent was given sufficient opportunity each time to cross examine but he refused to avail the opportunity. It was thereafter that the order was

passed on 04.04.1992 Inflicting the punishment of rigorous imprisonment of 6 months and dismissal from service.

6. It must be borne in mind that the rules governing the army service are not to be intermingled with the services rendered by the civilians. In that

regard special provisions have been made by the Parliament by enacting the Army Act and Rules As a consequence valid restrictions on

fundamental rights in relation to armed forces and paramilitary forces have been imposed. The issue is not res Integra. In the case of Ous Kutilingal

Achudan Nair and Others Vs. Union of India (UOI) and Others, the issue came up for consideration when the authorities cancelled the registration

of trade unions of camp followers which included non-combatants and un-enrolled cooks, chowkidars, barbers, carpenters, boot makers, tailors

etc. Upholding the action of army authorities the Constitution Bench held as under in para 10, 11 and 12:-

10. Article 33 of the Constitution provides an exception to the preceding Articles in Part III including Art 19(1)(c). By Article 33, Parliament is

empowered to enact law determining to what extent any of the rights conferred by Part III shall, in their application, to the members of the Armed

Forces or Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties and

the maintenance of discipline among them.

11. In enacting the Army Act, 1950, in so far as it restricts or abrogates any of the fundamental rights of the members of the Armed Forces,

Parliament derives its competence from Art. 33 of the Constitution. Section 2(1) of the Act enumerates the persons who are subject to the

operation of this Act. According to sub-clause (i) of this section, persons governed by the Act, include ""persons not otherwise subject to military

law who, on active service, in camp, on the march or at any frontier post specified by the Central Government by notification in this behalf, are

employed by, or are in the service of, or are followers of, or accompany any portion of the regular army.

12. The members of the Unions represented by the appellants fall within this category. It is their duty to follow or accompany the Armed personnel

on active service, or in camp or on the march. Although they are non-combatants and are in some matters governed by the Civil Service

Regulations, yet they are integral to the Armed Forces. They answer the description of the ""members of the Armed Forces"" within the

contemplation of Art. 33, Consequently, by virtue of Section 21 of the Army Act, the Central Government was competent by notification to make

rules restricting or curtailing their fundamental rights under Art. 19(1)(c).

7. The aforesaid view has been followed in *Gopal Upadhyaya and Others Vs. Union of India (UOI) and Others*, Therefore the punishment

awarded to the petitioner-respondent has to be viewed in the light of the duty assigned to him which was to combat insurgency in Kashmir at the

relevant time of his unauthorized absence. He was in the combating insurgency unit and the conclusion reached by the Chief of the Army Staff while

dismissing his appeal is that he avoided discharging his duty at the crucial time and his unauthorized absence was not acceptable. The question of

proportionate punishment which ordinarily is applicable to a civil servant would not be necessarily applicable in such cases where combating

operations have been assigned to a person like the petitioner-respondent. Therefore, the appeal deserves to be allowed and the findings recorded

by the learned Writ Court are liable to be set aside. As a sequel to the above discussion the appeal succeeds. The writ petition filed by the

petitioner-respondent is dismissed. Order dated 04.04.1992 and the appellate order dated 15.07.1997 passed by the Chief of the Army Staff are

upheld. However, keeping in view the peculiar facts and circumstances of this case we do not impose any costs.